

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	MM Docket No. 98-204
Review of the Commission's)	
Broadcast and Cable)	
Equal Employment Opportunity)	
Rules and Policies)	

To: Marlene H. Dortch, Secretary
Office of the Secretary

JOINT COMMENTS ON FCC FORM 395-B

Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Hawaii Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Kentucky Broadcasters Association, Louisiana Association of Broadcasters, Maine Association of Broadcasters, MD/DC/DE Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, The New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of

Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Virginia Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association, Wyoming Association of Broadcasters (collectively, the “State Associations”), by their attorneys in this matter, and pursuant to the Commission’s Public Notice entitled “Media Bureau Seeks Comment on Possible Changes to FCC Forms 395-A and 395-B,” released April 11, 2008 (DA 08-752) (the “*Public Notice*”), hereby jointly comment on this matter.

As demonstrated below, the Commission should refrain from making effective a requirement that broadcast stations publicly file the race, ethnicity, and gender data required by any version of the Form 395-B on a station-attributed basis – whether the 395-B conforms to the EEO 1 Form or otherwise – because: (i) the filing of the data would impermissibly place unconstitutional pressure on stations to hire based on race, ethnicity, and gender; (ii) the Commission has not demonstrated any overriding agency need for such data; and (iii) the Commission has not given serious consideration to using an independent third-party to collect, collate, and report employment data on a non-station-attributed, aggregated basis.

Discussion

At the outset it is important to emphasize that the State Associations continue to work hard to assist their member radio and television stations to fully comply with the Commission’s broadcast equal employment opportunity rule (the “EEO Rule”).¹ Many member stations, for example, conduct periodic legal seminars focusing on nondiscrimination, recruitment outreach,

¹ See 47 C.F.R. §73.2080.

and compliance with the Commission's EEO Rule; conduct job fairs; provide career information on their websites; solicit interns for station internship programs; and co-sponsor scholarship programs with participating stations. Many State Associations have partnered with Broadcast Compliance Services and the EEO1Source vacancy notification systems to help stations further expand their recruitment outreach activities and to facilitate data collection and reporting. Through the National Alliance of State Broadcasters Associations, the State Associations have also collaborated in creating a pioneering website that aggregates available job openings at radio and television stations throughout the 50 States, the District of Columbia, and Puerto Rico, so that job seekers would have a "one-stop shop" for employment opportunities across the entire breadth of the U.S. broadcast industry. In short, the commitment of the State Associations to equal employment opportunity is genuine and continuing.

For several years now, the Commission has engaged in a series of thorough, EEO-related audits of radio and television stations that are selected at random. To the knowledge of the State Associations, those audits have shown a high level of compliance with the Commission's EEO Rule. Consequently, the State Associations were surprised to learn from the release of the *Public Notice* that the Commission is seeking comment regarding conforming its Annual Employment Report on FCC Form 395-B to Form EEO-1 Employer Information Report, as revised by the Equal Employment Opportunity Commission. Because such action signals that the Commission is not only reviewing a station's EEO-related "efforts," but intends to return to the EEO-related "results" business of determining whether stations are hiring enough minorities and women, both overall and in certain job categories, a path that the Commission has traveled down twice before with adverse, constitutional consequences. For these reasons, the State Associations are compelled to comment in response to the *Public Notice*.

As the record in this proceeding demonstrates, the State Associations have been, and remain, strongly opposed to the use of FCC Form 395-B (or any similar form) to gather data regarding the race, ethnicity, and gender of employees of radio and television stations throughout the United States under circumstances where such data would be made available on a station-by-station attributed basis to members of the public, as well as to the Commission.² The State Associations submit that allowing the Commission and the public to have access to station-attributed, race/ethnicity/gender employee data raises the same type of very serious constitutional equal protection concerns that caused two separate panels of the United States Court of Appeals for the District of Columbia Circuit to strike down former “Commission equal employment opportunity rules that resulted in racial classifications and were thus subject to strict scrutiny under *Adarand*.”³

In its *Diversify Ownership Decision*, the Commission acknowledged those constitutional concerns when it “decided to employ a race- and gender-neutral definition [of eligible entities] so as to avoid constitutional difficulties that might create impediments to the timely implementation of the steps we take today to diversify broadcast ownership.”⁴ In the same vein, the State Associations submit that if the FCC were to reinstitute FCC Form 395-B in a manner that allows the Commission and/or members of the public to know how many persons of a particular race,

² In its *Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, Third Report and Order and Fourth Notice of Proposed Rulemaking, 19 FCC Rcd 9973, at ¶¶ 14-17 (2004), the Commission reinstated the regulatory requirement to file the form 395-B but issued a Fourth Notice of Proposed Rulemaking regarding whether the forms should be treated as confidential by the Commission after they are filed. For the Commission’s convenience, attached as Exhibits 1 and 2 are copies of the comments and reply comments filed by the State Associations in connection with the Fourth Notice of Proposed Rulemaking on July 29, 2004 and August 9, 2004, respectively.

³ In the *Matter of Promoting Diversification of Ownership in the Broadcast Services*, Report and Order and Third Further Notice of Proposed Rulemaking, 2008 FCC LEXIS 1882, at fn. 79 (rel. March 5, 2008) (“*Diversify Ownership Decision*”), citing *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13, 21-22 (D.C. Cir. 2001) *reh’g denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied sub nom. Minority Media and Telecom. Council v. MD/DC/DE Broadcasters Ass’n*, 534 U.S. 1113 (2002) (“*MD/DC/DE Broadcasters*”) and *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354-56 (D.C. Cir. 1988) (“*Lutheran Church*”).

⁴ *Diversify Ownership Decision* at ¶ 9.

ethnicity, or gender are employed and in which positions at specific stations, the Commission will have chosen a path diametrically opposed to the one followed in its *Diversify Ownership Decision*, one fraught with the very “constitutional difficulties” that the Commission so ably acknowledged in the *Diversify Ownership Decision* that it must avoid.

So why would it be constitutionally problematic for the FCC to collect this type of data and make it available to the public and for its own purposes? The simple answer is that the Commission may not do indirectly what it may not lawfully do directly. In holding a prior version of the FCC’s EEO Rule unconstitutional (the regulations focused on the degree of “underrepresentation” of minorities in a station’s workforce), the Court in *Lutheran Church* stated that:

... a station can assume that a hard-edged factor like statistics is bound to be one of the more noticed screening criteria. The risk lies not only in attracting the Commission’s attention, but also that of third parties. ‘Underrepresentation’ is often the impetus [as it was in the *Lutheran Church* case before the FCC] for the filing of a petition to deny, which in turn triggers intense EEO review. Further, and most significant in a station’s calculus, the Commission itself has given every indication that the employment profile is a serious matter.⁵

In addition, the Court in *MD/DC/DE Broadcasters* held unconstitutional the post-*Lutheran Church* version of the Commission’s EEO Rule because it required stations to focus on the race of applicants for employment. According to the Court:

[I]t is evidence that the agency with life and death power over the licensee is interested in results, not process, and is determined to get them. As a consequence, the threat of being investigated creates an even more powerful incentive for licensees to focus their recruiting efforts upon women and minorities, at least until those groups generate a safe proportion of the licensee’s job applications.⁶

⁵ *Lutheran Church* at 353 (citations omitted).

⁶ *MD/DC/DE Broadcasters* at 19-20.

The Commission is compelled to heed the directives of those two decisions: the Commission is constitutionally barred from pressuring broadcast stations to recruit and hire based on racial classifications.

The D.C. Circuit's decisions in *Lutheran Church* and *MD/DC/DE Broadcasters* undermine *any* justification for the FCC to collect the type of data required by the Form 395-B for public dissemination. If members of the public are allowed access to the 395-B employee profile data, this enables them to complain to the FCC that a particular station or group of stations does not employ enough women and minorities either overall or in certain job categories. Several organizations have long ago signaled that intent. For example, forty-eight "EEO Supporters" filed a letter with the FCC stating that they intended to liberally draw inference from statistics to determine whether stations are "discriminators" and that a difference of two standard deviations from the makeup of the local market will be enough to create a "presumption of discrimination."⁷ Other organizations had stated in their Intervenor's Brief in *MD/DC/DE Broadcasters* that the statistical data will make each station "more accountable to the community."⁸ The clear message is that all of these numerous organizations expect the Commission to hold every station "accountable" for not employing "enough" minorities and women both overall and in certain job categories.

It is clear that if the Commission were to reinstitute the FCC Form 395-B data collection process and allow the public to have access to that very granular, station-by-station employee profile data, it would be doing so knowing that such data will be used to urge the Commission to investigate and sanction individual stations for not employing enough persons of particular races, ethnicities, and genders in particular positions. As the Court in *MD/DC/DE Broadcasters* stated,

⁷ See October 1, 2002 *ex parte* letter filed by 49 "EEO Supporters" in connection with the Commission's Third Report and Order and Fourth Notice of Proposed Rulemaking in this proceeding.

⁸ See Intervenor's Brief of The National Organization for Women, *et al.* in *MD/DC/DE Broadcasters* at 26-27.

a regulatory agency, such as the Commission, has a number of ways to put pressure on its license holders, “some more subtle than others.”⁹ The Court noted that the Commission “has a long history of employing ... a variety of *sub silentio* pressures and ‘raised eyebrow’ regulation of program content ... The practice of forwarding viewer or listener complaints to the broadcaster with a request for a formal response to the FCC, the prominent speech or statement by a Commissioner or Executive official, the issuance of notices of inquiry ... serve as means for communicating official pressures to the licensee.”¹⁰ In this respect, an investigation based on data submitted on an FCC form “is a powerful threat, almost guaranteed to induce the desired behavior.”¹¹ The Court also stressed that “[a] station would be flatly imprudent to ignore any one of the factors that it knows may trigger intense review.”¹²

The State Associations are mindful that the Commission has previously claimed the 395-B employee data “will be used [by it] only for purposes of analyzing industry trends and reporting to Congress, and that it will not be used for the purpose of assessing any aspect of an individual broadcaster’s ... compliance with our EEO rules.”¹³ However, at no point has the Commission demonstrated that the requirement of the public filing of staffing profiles on a station-by station basis is either necessary or narrowly tailored in such a manner to satisfy the constitutional concerns repeatedly raised by the D.C. Circuit. Whether the data is in the hands of the Commission only, or in the hands of both the Commission and members of the public, the

⁹ *MD/DC/DE Broadcasters* at 19.

¹⁰ *Id.* (quoting *Community-Service Broadcasting of Mid-America v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978) (*en banc*)).

¹¹ *Id.* (citing *Chamber of Commerce v. Department of Labor*, 174 F.3d 206, 210 (D.C. Cir. 1999) and *BARRY COLE & MAL OTTINGER, RELUCTANT REGULATORS*, 213 (1978) (“investigatory hearing before the FCC ‘is considered by both key staff people and most commissioners almost as drastic as taking a license away.’”).

¹² *Lutheran Church* at 353.

¹³ *In the Matter of Review of the Commission’s Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 15 FCC Rcd 22548, ¶ 40 (2000).

problematic effect is the same: the resulting “raised eyebrow” regulation is foreseeably calculated to impermissibly pressure stations to recruit and hire on the basis of race and gender.

Moreover, it is important to note that while Section 634 of the Communications Act requires the cable operators to file annual statistical reports “identifying by race, sex, and job title the number of employees” in certain job categories, there is no comparable statutory requirement applicable to broadcast stations.¹⁴ Indeed, there is no statute *at all* mandating that broadcast stations submit to the Commission the race, ethnicity, and gender of their employees on any FCC form. This is yet further evidence that the public filing of staffing profiles, on a station-attributed basis, is not necessary to achieve a legitimate governmental interest.

Finally, even assuming *arguendo* that the Commission has a valid statutory mission to accomplish in collecting this employment profile data from broadcast stations (which it does not), it is clear that the Commission has not made any genuine effort to narrowly tailor the collection process *means* to its “industry trends” reporting *ends*. For example, a reputable third party could be engaged to collect the data, on a confidential basis, to collate it and to provide the Commission with non-station-attributed, aggregated data from which the Commission could determine “industry trends” and make “reports to Congress.” The Commission could adequately police the process by issuing a warning, when it announces the plan, making it clear that the failure of a station to timely provide the requested information, and the rendering of false or incomplete data, would subject the regulated provider to appropriate Commission sanctions. The entity engaged to collect the data would be expected to identify which stations have provided the requested information. From that, the Commission could determine which stations have not

¹⁴ Section 634(d)(3)(A) of the Communications Act of 1934, as amended, 47 U.S.C. § 554(d)(3)(A).

responded. The threat of serious sanctions would be an ample deterrent noncompliance and against fraud.

In a prior filing, the State Associations noted that respected company BIA Financial Network (“BIA”) expressed interest in becoming the collection/collating/publishing entity under this proposed plan.¹⁵ BIA has reaffirmed on the record in this proceeding that it remains willing to perform that role. A copy of BIA’s May 22, 2008, letter to the Commission is attached hereto as Exhibit 4. BIA would accept the data under a pledge of confidentiality extended to respondents by the Commission under the Confidential Information Protection and Statistical Act of 2002.¹⁶ Surely BIA can be reasonably relied upon to provide the Commission with aggregated data, under a wide variety of configurations, with the understanding that such data would not directly or indirectly identify any particular station or station group. In short, there is no need for the Commission to assume the clear constitutional risks a third time.

¹⁵ Attached as Exhibit 3 is a copy of the August 4, 2003 letter from Mark R. Fratrik of BIA to Les Smith of the FCC indicating BIA’s willingness to collect/collate/publish 395-B report data on a non-station-attributed, aggregate basis.

¹⁶ Pub. L. 107-347, 116 Stat 2962, Dec. 17, 2002, codified in note to 44 U.S.C. § 3501.

Conclusion

Based on the foregoing, it is clear that any action by the Commission to reinstitute FCC Form 395-B under circumstances where members of the public or the Commission will have access to the minority and female staffing profiles of individual stations or station groups would be unconstitutional.

Respectfully submitted,

NAMED STATE BROADCASTERS ASSOCIATIONS

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Dated: May 22, 2008

#400832501

EXHIBIT 1

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To: Ms. Marlene H. Dortch, Secretary,
Office of the Secretary

**JOINT COMMENTS OF THE
NAMED STATE BROADCASTERS ASSOCIATIONS**

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Dated: July 29, 2004

SUMMARY

As they have explained earlier in this proceeding, the State Associations have been established to advance the best interests of the free, local, over-the-air, full service, radio and television broadcast industry and to help broadcast stations serve the public. The State Associations have been consistent in their positions that unlawful discrimination in employment is noxious and should not be tolerated. They have also been consistent in favoring, and indeed actively promoting, voluntary efforts by broadcasters to recruit employees from the entire labor pool, regardless of their race, ethnicity, or gender. In short, they expect all broadcasters to be Equal Opportunity Employers. However, the State Associations have had, and continue to have, a strong difference of opinion with the Commission concerning the agency's regulatory role in this area. The issue of FCC Form 395-B is a case in point.

As demonstrated below, any FCC requirement that non-exempt broadcast stations be required to *publicly file, on a station-by-station attributed basis*, the employment data contemplated under FCC Form 395-B will place unconstitutional pressure on stations to hire based on race, ethnicity, and gender, and will thus violate the Constitution for the reasons stated in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *reh'g en banc denied*, 154 F.3d 487 (D.C. Cir. 1998) and in *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, *reh'g denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002). In order to avoid these constitutional problems, the FCC must refrain from re-instituting a scheme whereby publicly available, station attributable Annual Employment Reports are required. If the Commission finds it necessary to conduct annual surveys of industry employment profile trends, it can easily do so by allowing broadcasters to file the FCC Form 395-B data either with a responsible third party such as BIA, or directly with the FCC on a tear sheet basis where the

identity of the filer is separated from the filer's data as soon as the fact of the filing is logged in by the FCC. Such an outcome is entirely consistent with – and indeed authorized by – the Confidential Information Protection and Statistical Efficiency Act of 2002 which permits the FCC to keep the identity of a Form 395-B filer confidential while allowing the Commission to monitor industry trends.

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Office of the Secretary
Attention: Lewis Pulley, Assistant Chief,
Policy Division, Media Bureau

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Association of Broadcasters, Georgia Association of Broadcasters, Idaho State Broadcasters
Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa
Broadcasters Association, Kansas Association of Broadcasters, Louisiana Association of
Broadcasters, Maine Association of Broadcasters, Maryland/District of Columbia/Delaware
Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of
Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters,
Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters
Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters,
New Jersey Broadcasters Association, New Mexico Broadcasters Association, New York State

Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters, Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association and Wyoming Association of Broadcasters (collectively, the “State Associations”), by their attorneys and pursuant to Sections 1.415 and 1.419 of the Commission’s Rules, 47 C.F.R. §§ 1.415, 1.419, hereby jointly comment (these “Joint Comments”) in response to the *Fourth Notice of Proposed Rule Making* (the “*Fourth NPRM*”), 69 Fed. Reg. 34986 (June 23, 2004), in the above-captioned proceeding. These Joint Comments, which are being filed with the Commission on July 29, 2004, are timely filed by virtue of the extension of time granted by Order of the Commission adopted July 1, 2004 and released July 2, 2004 (DA 04-2015).

Background

As they have explained earlier in this proceeding, the State Associations have been established to advance the best interests of the free, local, over-the-air, full service, radio and television broadcast industry and to help broadcast stations serve the public.¹ The State Associations have been consistent in their positions that unlawful discrimination in employment is noxious and should not be tolerated. They have also been consistent in favoring, and indeed actively promoting, voluntary efforts by broadcasters to recruit employees from the entire labor

¹ The State Associations hereby incorporate by reference the following submissions they made in this and prior related FCC proceedings, including but not limited to, Joint Comments dated April 15, 2002, Joint Reply Comments dated May 29, 2002, Joint Petition for Reconsideration and Clarification dated February 6, 2003, and Joint Petition for Reconsideration and/or Clarification filed July 23, 2004.

pool, regardless of their race, ethnicity, or gender. In short, they expect all broadcasters to be Equal Opportunity Employers. However, the State Associations have had, and continue to have, a strong difference of opinion with the Commission concerning the agency's regulatory role in this area. The issue of FCC Form 395-B is a case in point.

As demonstrated below, any FCC requirement that non-exempt broadcast stations be required to *publicly file, on a station-by-station attributed basis*, the employment data contemplated under FCC Form 395-B will place unconstitutional pressure on stations to hire based on race, ethnicity, and gender, and will thus violate the Constitution for the reasons stated in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *reh'g en banc denied*, 154 F.3d 487 (D.C. Cir. 1998) ("*Lutheran Church*") and in *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, *reh'g denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002) ("*Broadcasters*"). In order to avoid these constitutional problems, the FCC must refrain from re-instituting a scheme whereby publicly available, station attributable FCC Form 395-B Reports are required. If the Commission finds it necessary to conduct annual surveys of industry employment profile trends, it can easily do so by allowing broadcasters to file the FCC Form 395-B data either with a responsible third party such as BIA, or directly with the FCC on a tear sheet basis where the identity of the filer is separated from the filer's data as soon as the fact of the filing is logged in by the FCC. Such an outcome is entirely consistent with – and indeed authorized by – the Confidential Information Protection and Statistical Efficiency Act of 2002 ("CIPSEA"),² which permits the FCC to keep the identity of a Form 395-B filer confidential while allowing the Commission to monitor industry trends.

² Pub. L. 107-347, 116 Stat. 2962, Dec. 17, 2002, codified in note to 44 U.S.C. § 3501.

A. Any Requirement that the FCC Form 395-B be Publicly Filed, on a Station Attributed Basis, Would be Unconstitutional

The mandatory public filing of station attributed statistical data contained in Form 395-B would require every television and radio station, with minor exceptions, to annually place in the public domain detailed data disclosing the racial, ethnic, and gender groupings of each station's full-time and part-time staffing. The Form 395-B requires each broadcaster to provide the Commission with statistical data regarding the number of women and minorities (grouped by race/ethnicity/gender) that the broadcaster employs full-time and part-time in various job categories.³ For the reasons stated in *Lutheran Church and Broadcasters*, a requirement that these forms be filed in a way that permits either the public or the FCC to monitor a station's hiring by race, ethnicity, and gender would violate the Fifth Amendment of the Constitution.

The Commission notes in the *Fourth NPRM* that the Form 395-B was publicly available for many years, and asks whether this provides any reason for continuing to make them publicly available on a station by station attributed basis. *Fourth NPRM* at ¶ 14. The answer is: emphatically no. The United States Court of Appeals for the District of Columbia Circuit concluded in *Lutheran Church* that the requirement that the Form 395-B be publicly filed on a station-by-station basis was in material part responsible for the unconstitutional pressure placed on broadcasters to hire based on race. The Court noted, "[t]he risk lies not only in attracting the

³ Specifically, the Form requests that employees be grouped into the following categories: (a) White (Not Hispanic); (b) Black (Not Hispanic); (c) Hispanic; (d) Asian or Pacific Islander; and (e) American Indian, Alaskan Native. In addition, Item 10 of the current Form's Instructions directs stations to identify minorities in the following way:

Minority group information necessary for this section may be obtained either by visual surveys of the work force, or from post employment records as to the identity of employees. An employee may be included in the minority group to which he or she appears to belong, or is regarded in the community as belonging.... [t]he category which most closely reflects the individual's recognition in his community should be used to report persons of mixed racial and/or ethnic origins.

Commission's attention, but also that of third parties."⁴ Thus, the burden of proof now surely rests on those who propose to continue to make the 395-B data public – they must show that there is some legitimate reason *other than* the unconstitutional purpose which is to make the forms public so that third parties and the FCC may monitor each station's hiring based on race, ethnicity, and gender. They simply cannot do so.

Indeed, Minority Media and Telecommunications Council ("MMTC") and forty-seven other organizations filed a letter with the FCC in this proceeding on October 1, 2002, that provides graphic confirmation that the proposed station attributed Form 395-B statistical data would violate the central teaching of both *Lutheran Church* and *Broadcasters*. In that filing, MMTC makes clear that it intends to "liberally draw inferences from statistics" to determine whether stations are "discriminators."⁵ In performing statistical comparisons of the broadcasters' employees with the local workforce, MMTC made clear its position that a difference of two standard deviations from the makeup of the local market will be enough to create a "presumption of discrimination."⁶ Similarly, the National Organization for Women, as Intervenor, acknowledged in their brief to the Court in *Broadcasters* (at 26-27) that the FCC Form 395-B will make each station "more accountable to the community."

In short, the only reason offered for making the FCC Form 395-B public and station-attributable is for the improper purpose of comparing the racial, ethnic, or gender composition of some hypothetical labor pool and then using such statistics to make claims that a station's recruitment and hiring efforts are impermissibly inadequate or that the station engages in discrimination. All of those comparisons amount to one essential claim: the station has not hired

⁴ *Lutheran Church* at 353.

⁵ MMTC Comments on the *NPRM* at 315.

⁶ *Id.* at 315 n.459.

enough women and/or minorities. The threat by third parties, assisted by the FCC's data gathering requirements, to use the data to draw inferences and to pursue actions against broadcast employers at the Commission, is a textbook case of applying illegitimate pressure. It was exactly this kind of pressure, whether applied by government regulators or by third parties with the assistance of government regulators, that the D.C. Circuit explicitly found unconstitutional in *Lutheran Church*.

By placing broadcasters under the threat of such charges of discrimination and resulting adverse action, the FCC has created a situation essentially identical to that found unconstitutional in *Lutheran Church*. As was the case in *Lutheran Church*, broadcasters will be severely prejudiced by having to undergo investigations by the FCC regarding compliance with regulations that will again pressure stations impermissibly to hire based on race, ethnicity, and gender. Moreover, the immediate effects of the regulation are apparent, particularly since "[t]he Commission in particular has a long history of employing 'a variety of *sub silentio* pressures and 'raised eyebrow' regulation" *Broadcasters* at 19 (citing *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978)). This practice has been recognized as especially problematic when, as appears to be the case here, "[t]he agency with life and death power over the licensee is interested in results, not process, and is determined to get them." *Id.*

This will be so even if the Commission pledges not to use the Form 395-B statistical data directly to measure a station's performance because the reports will be used by *third-parties before the FCC* in a way that will lead to governmental involvement and, thus, unconstitutional pressure. The fact that the FCC has stated that it is not currently willing to equate underrepresentation with intentional discrimination does nothing to dispel the legitimate concern that

such under-representation-based petitions, objections, or complaints will heighten the incidence of “government audits,” whether on that purported basis, another purported basis, or a mix of purported bases.

Moreover, while it might initially appear that the *Third Report and Order*, 69 Fed. Reg. 34950 (June 23, 2004), (“*Third Order*”) precludes use of the racial, ethnic, and gender employment data in judging compliance with the nondiscrimination requirements of the FCC’s EEO regulations, a closer examination of the *Third Order* makes this unclear, to say the least. The *Third Order* does state that the Commission will not use the racial, ethnic, and gender employment data to assess a broadcaster’s compliance with the Commission’s EEO Rules.⁷ And the newly reinstituted Form 395-B rule contains a Note which, on cursory review, appears consistent with that representation. The Note states: “Such data will not be used for the purpose of assessing any aspect of an individual broadcast licensee’s compliance with the *equal employment opportunity requirements* of Section 73.2080.” (Emphasis added). However, the FCC’s “EEO rules” in Section 73.2080, 47 C.F.R. § 73.2080, have two components: a nondiscrimination component (subsection (a)), and an equal employment opportunity component (subsection (b)). The carefully worded Note is therefore arguably best read to provide that, although the FCC will not use the race, ethnicity, and gender data to assess compliance with the *equal employment opportunity requirements* under Subsection (b), the FCC *will allow, and indeed will facilitate*, use of the data to assess an individual broadcast licensee’s compliance with the *nondiscrimination requirements* under Subsection (a) of its EEO rules.

For all these reasons, the FCC should not require Form 395-B to be filed publicly or otherwise. However, should the Commission nevertheless believe that it must gather

⁷ See *Third Order* at ¶ 2 and n.6.

information on national trends, reports on the racial, ethnic, or gender profile of stations should only be filed with a responsible third party such as BIA or with the government on an anonymous basis, where the identity of the filer is separated from in *anonymous aggregated form*. Otherwise, the EEO regulations will again be unconstitutional because they will unlawfully pressure stations to hire based on gender, race, or ethnicity.

B. The Commission Cannot Show That the Requirement for the Public Filing of Station Attributed Employee Profile Data is Necessary or Narrowly Tailored to Achieve a Lawful End

As the Associations demonstrated in their Joint Reply Comments in connection with the *Second Order* (at 9), the pressure to based on race, caused by publication of station attributable Form 395-B data, means that a requirement for such filings is subject to strict scrutiny, as “[a]ll governmental action based on race – a group classification long recognized as ‘in most circumstances irrelevant and therefore prohibited’ – should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.” *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (citing *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1943)). Station attributed public filings could therefore be justified only if they were narrowly tailored to achieve a compelling governmental interest. *Lutheran Church*, 141 F.3d at 354, citing *Adarand*, 515 U.S. 200. A requirement for public filing of station attributed employee profile data could not meet any part of this test.

The Commission professes that, in response to judicial concerns about the FCC's previous use of group classifications based on race, its new EEO regulations are efforts-based, not results-based. However, on its face, the FCC's decision to once again collect race, ethnicity and gender-based station work force data in FCC Form 395-B is precisely the same type of race-based group classifications about which the D.C. Circuit has twice admonished the Commission.

Under *Lutheran Church and Broadcasters*, the Commission has the burden of showing that the collection of such race-based data on a publicly disclosed, station-by-station attributed basis is narrowly tailored to achieve a compelling governmental interest. But the fact that its new EEO regulations are intended to be efforts-based, rather than results-based, undercuts any argument by the Commission that such data, even if germane under the new EEO approach of the FCC (which the State Associations do not concede), must be publicly disclosed on a station-by-station basis. In addition, given the sway that the Commission has over every broadcast regulatee, race-based data collected and disclosed in this way will place impermissible pressure on stations to recruit and hire based on race. The same is true for women.

Even assuming arguendo that there were a legitimate need to monitor “industry trends” in the hiring of minorities and women, the requirement of the public filing of staffing profiles on a station-by-station basis is neither necessary nor narrowly tailored to achieve that goal, particularly in light of the constitutional concerns raised above. The FCC has long claimed that the statistical data in FCC Form 395-B Reports is primarily intended to show “industry employment patterns.” However, the D.C. Circuit nonetheless correctly found in *Lutheran Church* that the reports *in fact* put pressure on broadcasters to use racial classifications in hiring and determined that the pressures on stations to hire based on race were significant because of the dangers of attracting third-party attention.⁸ This reality cannot change as long as any rule mandates publicly available, station attributed FCC Forms 395-B such as those under review in this proceeding.

If the FCC is truly concerned about “industry trends” in the employment of women and minorities, it could use the obvious alternatives of employing a responsible third party such as

⁸ *Id.*

BIA, or a “tear-off” sheet system to remove the identity of the station, once the fact of filing was established, which would still enable it to monitor “industry employment patterns.” Whether the FCC retains a paper filing requirement, or uses an electronic filing methodology, separation of the identify of the filer should not prevent the FCC from regionalizing employment trends, or from showing employment trends by AM, FM, or TV, etc. All that needs to be done is for the FCC to anticipate now how granular it wishes to be and modify the Form 395-B so that once the identity of the filer is separated from the filing, sufficient generalized station type and station location-based information have been preserved with the data portion of the filing.⁹

Collection of the Form 395-B race, ethnicity, and gender data in this manner would ensure that the forms are not used, and there is no threat of such use, for the improper purpose of comparing an individual station’s workforce to the general population. It would alleviate the serious constitutional concerns raised by the public filing of station attributed data while providing the FCC with its “industry trend” data and would also likely satisfy the Court of Appeals which specifically questioned FCC counsel during oral argument in *Broadcasters* as to why the FCC could not devise a system to collect the employment statistics gathered via submission of FCC Forms 395-B in a non-station attributable manner. The question to counsel

⁹ With respect to the Commission’s request for comment (at ¶ 17) regarding whether this proposal would violate the Federal Records Act, there is simply nothing in that Act which precludes the Commission from separating the identify of the filer from the Form 395-B statistical data provided. Indeed, as the State Associations explained in their Reply Brief in *Broadcasters*, dated August 21, 2000 at n.10:

The use of a “tear-off sheet” system by the federal government has current precedent. The Federal Aviation Administration uses a de-identification/tear-off portion of its Aviation Safety Reporting Program, a highly successful and trusted program that has been in place for 24 years. Under the FAA’s program, each Aviation Safety Report has a “tear-off portion” containing the information identifying the person submitting the report. Aviation Safety Reporting Program, Advisory Circular 00-46D (February 26, 1997); 14 C.F.R. § 91.25. This identification is removed from the report and returned to the person reporting as proof that he or she has filed a report.

was surely a forewarning to the Commission that use of publicly-filed, station attributed, FCC Form 395-B will no longer be permitted. For these reasons, the State Associations strongly urge the Commission to heed that apparent warning and not require the public filing of station attributed staffing data.

C. Maintaining the Confidentiality of the Form 395-B Statistical Data is Entirely Consistent with the Confidential Information Protection and Statistical Efficiency Act of 2002

The FCC's interest in FCC Form 395-B data is precisely the type of statistical data that CIPSEA authorizes be kept confidential. Subtitle A of the Act directs federal agencies to designate information as being for an exclusively "statistical purpose" and permits the agency to collect such information under a pledge of confidentiality. CIPSEA's definition of "statistical purpose" is the "description, estimation, or analysis of characteristics of groups, without identifying the individuals or organizations that comprise such groups."¹⁰ In addition, the Act's defines "nonstatistical purpose" as "the use of data in identifiable form for any purpose that is not a statistical purpose, including any administrative, regulatory, law enforcement, adjudicatory, or other purposes that affects the rights, privileges, or benefits of a particular identifiable respondent."¹¹ As noted above, the FCC has repeatedly stated that it intends to use the race, ethnicity, and gender statistically grouped data included in the Form 395-B exclusively to compile industry trend reports to Congress, and that the statistical data would not be used to determine compliance with the substantive EEO rules adopted.¹² This goal is entirely consistent with CIPSEA's distinction between data used solely for a statistical purpose to describe or make

¹⁰ CIPSEA, Section 502(9).

¹¹ CIPSEA, Section 502(5).

¹² See *Second Report and Order and Third Notice of Proposed Rulemaking*, 17 FCC Rcd 24018 at ¶ 17 (2002), *recon. pending*; *Fourth Notice* at ¶¶ 2, 15.

estimates about groups or subgroups of the economy and society, and data used for administrative or regulatory enforcement.

Similarly, the findings of Congress in enacting CIPSEA compel the conclusion that the FCC should maintain the confidentiality of the Form 395-B statistical data. According to Representative Stephen Horn of California who first introduced CIPSEA, an important goal of the Act is to ensure:

that the confidential data that citizens and businesses provide to federal agencies for statistical purposes are subject to uniform and rigorous statutory protections against unauthorized use. Currently, confidentiality protections vary among agencies and are often not based in law. The bill would provide uniformly high confidentiality standards that federal statistical agencies must follow. This part of the bill applies to all federal statistical agencies not just the Census Bureau, Bureau of Labor Statistics and Bureau of Economic Analysis.¹³

Moreover, in creating significant new confidentiality rules for agencies that are designed to protect the privacy of respondents, Section 511 of the Act includes the following findings of Congress that certainly apply to the requirement that broadcasters file Form 395-B statistical data:

(1) Individuals, businesses, and other organizations have varying degrees of legal protection when providing information to the agencies for strictly statistical purposes; (2) Pledges of confidentiality by agencies provide assurances to the public that information about individuals or organizations or provided by individuals or organizations for exclusively statistical purposes will be held in confidence and will not be used against such individuals or organizations in any agency action; (3) Protecting the confidentiality interests of individuals or organizations who provide information under a pledge of confidentiality for Federal statistical programs serves both the interests of the public and the needs of society; (4) Declining trust of the public in the protection of information provided under a pledge of confidentiality to the agencies adversely affects both the accuracy and completeness of statistical analyses; and (5) Ensuring that information provided under a pledge of confidentiality for statistical purposes receives protection is essential in continuing public cooperation in statistical programs.¹⁴

¹³ 148 CONG. REC. E 2144, 152 (daily ed. Nov. 17, 2002) (Statement of Rep. Horn).

¹⁴ CIPSEA, Section 511(a)(1)-(5).

In this case, maintaining the confidentiality of the Form 395-B statistical data pursuant to CIPSEA would help to resolve the concerns of broadcasters, and would also help resolve the grave constitutional problems detailed above, by permitting stations to file reports anonymously while allowing the Commission to achieve its stated goal of monitoring and analyzing trends in the broadcast industry.

Finally, Form 395-B statistical data may or may not be within the purview of the Federal Advisory Committee on Diversity in the Digital Age (“Advisory Committee”). MMTC, in its September 29, 2003 Memorandum to the Committee, takes the position that “other proposals are pending in the EEO rulemaking, which we understand to be not within the scope of the Committee’s work.” *Memorandum from David E. Honig, Executive Director MMTC to Fellow Members, Federal Advisory Committee on Diversity in the Digital Age* Attachment at 4 (Sept. 29, 2003) available at <http://www.fcc.gov/DiversityFAC/docs/honig9-29-03.pdf>. Among the “other proposals” cited by MMTC are those surrounding the reinstatement of the Form 395-B and the matter of keeping the statistical data included in the Form confidential. In any case, as shown above, any requirement that the Form 395-B be publicly filed on a station attributed basis would unconstitutionally pressure stations to hire on the basis of gender, race, or ethnicity. And surely the Advisory Committee cannot be permitted to do what the Commission itself is constitutionally prohibited from doing, namely, utilizing Form 395-B statistical data to pressure stations to hire based on gender, race, or ethnicity.¹⁵

¹⁵ This necessarily precludes use of station-attributable 395-Bs by the Advisory Committee as “the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.” 5 U.S.C. app. 2 § 2(b)(6).

CONCLUSION

The State Associations respectfully urge the Commission to act in a manner fully consistent with these Joint Comments.

Respectfully submitted,

By: /s/
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Dated: July 29, 2004

EXHIBIT 2

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 98-204
Broadcast and Cable)	
Equal Employment Opportunity)	
Rules and Practices)	

**JOINT REPLY COMMENTS OF
THE NAMED STATE BROADCASTERS ASSOCIATIONS**

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SUMMARY

In their own opening Joint Comments filed on July 29 in this proceeding, the State Associations showed what common sense already tells us, namely that any FCC requirement that broadcasters publicly disclose their station employee profile data, grouped by race, ethnicity and gender, creates pressure on stations to recruit and hire based on race, ethnicity, and gender. It is apparent that the National Organization for Women, Office of Communication of the United Church of Christ, Inc., and Minority Media and Telecommunications Council, et al. agree, fundamentally, that this dynamic exists. Otherwise these parties would not have expressly relied upon the following conclusion of Cass R. Sunstein in their Joint Comments: “a disclosure requirement will by itself trigger improved performance, by creating a kind of competition to do better, and by enlisting various social *pressures* in the direction of improved performance.” MMTC Comments at 6 (emphasis added). In the context of this proceeding, “improved performance” can only mean one thing: that stations will be pressured to recruit and hire more minorities and women because they are minorities and women.

As the Commission is aware, such unconstitutional pressure is the primary reason the United States Court of Appeals for the District of Columbia Circuit in *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *reh’g en banc denied*, 154 F.3d 487 (D.C. Cir. 1998) and again in *MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13, *reh’g denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002) vacated the Commission’s prior EEO regulations. As the comments of the State Associations and National Association of Broadcasters make clear, by making Form 395-B data publicly available and placing broadcasters under the threat of charges such as employment discrimination with

resulting adverse action, the FCC would create a situation essentially identical to that found unconstitutional in these cases.

The Commission need not confront these constitutional problems and the jeopardy in which such problems would place its entire EEO regulations for a third time. Notwithstanding protestations by MMTC and others, the Commission is fully authorized to maintain the confidentiality of FCC Form 395-B statistical data, and nothing in the record justifies making the data public. Specifically, the Confidential Information Protection and Statistical Act of 2002 gives the FCC all the authority that it needs to offer a pledge of confidentiality in connection with every FCC Form 395-B required to be filed. Moreover, Section 334 of the Communications Act does not bar the Commission from accepting FCC Form 395-B submissions under a pledge of confidentiality since such a pledge does not require the FCC to modify the form in any way. Should the Commission nevertheless decide to make the Form 395-B statistical data available to the public on a station attributed basis, thereby pressuring stations to recruit and hire based on race, ethnicity, or gender, the State Associations will be left with no alternative other than to again seek redress in court. For these reasons, the State Associations respectfully urge the Commission to refrain from re-instituting a scheme whereby station attributable FCC Form 395-B minority and gender-grouped data are required to be made public.

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Review of the Commission's)	MM Docket No. 98-204
Broadcast and Cable)	
Equal Employment Opportunity)	
Rules and Practices)	

**JOINT REPLY COMMENTS OF
THE NAMED STATE BROADCASTERS ASSOCIATIONS**

Alabama Broadcasters Association, Alaska Broadcasters Association, Arizona Broadcasters Association, Arkansas Broadcasters Association, California Broadcasters Association, Colorado Broadcasters Association, Connecticut Broadcasters Association, Florida Association of Broadcasters, Georgia Association of Broadcasters, Idaho State Broadcasters Association, Illinois Broadcasters Association, Indiana Broadcasters Association, Iowa Broadcasters Association, Kansas Association of Broadcasters, Louisiana Association of Broadcasters, Maine Association of Broadcasters, Maryland/District of Columbia/Delaware Broadcasters Association, Massachusetts Broadcasters Association, Michigan Association of Broadcasters, Minnesota Broadcasters Association, Mississippi Association of Broadcasters, Missouri Broadcasters Association, Montana Broadcasters Association, Nebraska Broadcasters Association, Nevada Broadcasters Association, New Hampshire Association of Broadcasters, New Jersey Broadcasters Association, New Mexico Broadcasters Association, New York State Broadcasters Association, Inc., North Dakota Broadcasters Association, Ohio Association of Broadcasters, Oklahoma Association of Broadcasters, Oregon Association of Broadcasters,

Pennsylvania Association of Broadcasters, Rhode Island Broadcasters Association, South Carolina Broadcasters Association, South Dakota Broadcasters Association, Tennessee Association of Broadcasters, Texas Association of Broadcasters, Utah Broadcasters Association, Vermont Association of Broadcasters, Washington State Association of Broadcasters, Wisconsin Broadcasters Association and Wyoming Association of Broadcasters (collectively, the "State Associations"), by their attorneys in this matter, and pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, hereby jointly reply to the Comments of the National Association of Broadcasters ("NAB") and the Comments of the National Organization for Women, Office of Communication of the United Church of Christ, Inc., Minority Media and Telecommunications Council, et al. (collectively, "MMTC") filed in the above-captioned proceeding on July 29, 2004.

Discussion

In their own opening Joint Comments also filed on July 29 in this proceeding, the State Associations showed what common sense already tells us, namely that any FCC requirement that broadcasters publicly disclose their station employee profile data, grouped by race, ethnicity and gender, creates pressure on stations to recruit and hire based on race, ethnicity and gender. It is apparent that MMTC agrees, fundamentally, that this dynamic exists. Otherwise MMTC would not have expressly relied upon the following conclusion of Cass R. Sunstein: "a disclosure requirement will by itself trigger improved performance, by creating a kind of competition to do better, and by enlisting various social *pressures* in the direction of improved performance." MMTC Comments at 6 (emphasis added). In the context of this proceeding, "improved performance" can only mean one thing: that stations will be pressured to recruit and hire more minorities and women because they are minorities and women.

What MMTC is careful not to acknowledge fully is that the pressure created by Mr. Sunstein's "effective regulatory tool" far understates the impermissible pressure that the FCC regulatees have felt in the past, and will feel in the future if the FCC were to require that the data contained in FCC Form 395-B be publicly disclosed on a station-attributed basis. This is not just the position of the State Associations. It is also the ruling of the United States Court of Appeals for the District of Columbia Circuit in two cases involving the FCC's former EEO regulations: *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), *reh'g en banc denied*, 154 F.3d 487 (D.C. Cir. 1998) ("*Lutheran Church*") and in *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, *reh'g denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 1113 (2002) ("*Broadcasters*"). By placing broadcasters under the threat of employment discrimination charges, which would be based on claims that they do not employ *enough* women and minorities, either overall or in the top four job categories, with the potential for resulting adverse action, the FCC would create a situation essentially identical to that found unconstitutional in *Lutheran Church*. As was the case in *Lutheran Church*, broadcasters will be severely prejudiced by having to undergo investigations by the FCC regarding compliance with regulations that will again pressure stations impermissibly to hire based on race, ethnicity, and gender. Moreover, the immediate effects of the regulation are apparent, particularly since "[t]he Commission in particular has a long history of employing 'a variety of *sub silentio* pressures and 'raised eyebrow' regulation" *Broadcasters*, 236 F.3d at 19 (citing *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1116 (D.C. Cir. 1978)). This practice has been recognized as especially problematic when, as appears to be the case here, "[t]he agency with life and death power over the licensee is interested in results, not process, and is determined to get them." *Id.*

There can be no genuine disagreement that the FCC holds the power of life and death over every broadcast station. MMTC does not dispute that the Commission could use the FCC Form 395-B statistical data, at any time, to assess a broadcaster's presumed compliance with the nondiscrimination component of the FCC's EEO Rule, and to impose a multitude of adverse actions against a noncompliant broadcaster. Nor does MMTC dispute that a third party could use the FCC Form 395-B statistical data as a part of a claim or suit before any Federal, state, or local court or any EEOC agency, knowing that such action and the results thereof would have to be disclosed to the FCC by the broadcaster and could be used by the FCC to take adverse action against the broadcaster. Indeed, the entities comprising MMTC have gone on record in this proceeding, stating that they intend to use the data to go after broadcasters and "hold them accountable" before the FCC if they do not employ enough minorities and women.¹ As MMTC demonstrated very recently, it has used statistical evidence about minority broadcast employees as its only evidence of the "success" of earlier EEO rules, and on the basis of statistical "evidence," repeated the outlandish and defamatory claim that "almost a quarter of large broadcasters discriminate intentionally."² Thus, it is plainly disingenuous for MMTC to contend that broadcasters have nothing to fear if the Form 395-B statistical data were made public.

The Commission needs to be aware that MMTC is once again pushing the FCC towards rules with grave constitutional defects. In *Lutheran Church*, the D.C. Circuit ruled that the

¹ MMTC has made clear that it intends to "liberally draw inferences from statistics" to determine whether stations are "discriminators." MMTC Comments on the *NPRM* at 315. Moreover, in performing statistical comparisons of the broadcasters' employees with the local workforce, MMTC has stated its position that a difference of two standard deviations from the makeup of the local market will be enough to create a "presumption of discrimination." *Id.* at 315 n.459. Similarly, NOW, as intervenors, acknowledged in their brief to the court in *Broadcasters* (at 26-27) that the FCC Form 395-B will make each station "more accountable to the community."

² See Response lodged by the Intervenor EEO Supporters in the United States Court of Appeals for the District of Columbia in *Maryland-District of Columbia-Delaware Broadcasters Association, Inc., et al.*, Case No. 04-1192, at 14.

action of the FCC making publicly available racially based profile data on a station's employees was an integral part of a scheme that created impermissible government pressure on stations to recruit and hire based on race.³ Later, in *Broadcasters*, the Court of Appeals specifically questioned FCC counsel during oral argument as to why the FCC could not devise a system to collect the employment statistics gathered via submission of Forms 395-B in a non-station attributable manner. The question to counsel was surely a forewarning to the Commission that use of publicly-filed, station attributed, Form 395-B will no longer be permitted. The State Associations respectfully urge the FCC to heed this warning.

The Commission can avoid these constitutional problems that will place the FCC's entire EEO regulations in jeopardy for a third time. Notwithstanding MMTC's protestations, the Confidential Information Protection and Statistical Act of 2002 ("CIPSEA") gives the FCC all the authority that it needs to offer a pledge of confidentiality in connection with every FCC Form 395-B required to be filed. Thus, there are no Freedom of Information Act ("FOIA") concerns. Nor does Section 334 of the Communications Act of 1934, as amended, bar the Commission from accepting FCC Form 395-B submissions under a pledge of confidentiality since such a pledge does not require the FCC to modify the form. Furthermore, because FCC Form 395-B would be filed with the Commission, albeit under a pledge of confidentiality, the FCC would not be faced with the situation where some categories of regulatees would be required to file the data and other categories would not be so required.

**A. THE COMMISSION IS FULLY AUTHORIZED TO MAINTAIN THE
CONFIDENTIALITY OF FCC FORM 395-B DATA**

The enactment of CIPSEA removed any FOIA-related justification for the FCC to continue to require that racial, ethnic and gender-grouped employee data be made publicly

³ 141 F.3d at 353-54.

available on a station by station attributed basis. In its Comments, the NAB presents an analysis, in this regard, that is both well-grounded and compelling. The legislative history of CIPSEA makes it clear that data required for “statistical purposes” under a pledge of confidentiality does not need to be disclosed, and may not be disclosed, pursuant to FOIA. Admittedly, whether the Commission may collect the Form 395-B data under a pledge of confidentiality and deny access to it depends on the purpose or purposes for which the data would be collected. CIPSEA defines “statistical purpose” as the “description, estimation, or analysis of the characteristics of groups, without identifying the individuals or organizations that comprise such groups.”⁴ The term “nonstatistical purpose” is defined as “the use of data in identifiable form for any purpose that is not a statistical purpose, including any administrative, regulatory, law enforcement, adjudicatory, or other purpose that affects the rights, privileges, or benefits of a particular identifiable respondent.”⁵

In the *Third Report and Order*, the Commission states (at ¶ 3) that “the information provided by the annual employment reports is important in order to ascertain industry trends, report to Congress, and respond to inquiries from Congress.” Parsing through these purposes, none of them require the Commission, Congress, or a Member of Congress to know how many minorities or women work *at a particular station employment unit* as full-time or part-time employees in any particular job categories. Significantly, the thirty years of annual reports filed with Congress only supplied aggregate data and did not identify any particular Form 395-B respondent. Clearly these purposes intended for use by Congress are exclusively “statistical.”

Consistent with this, the Commission has attempted on a number of occasions to reinforce the notion that it is interested in this data only for industry-wide statistical purposes, not

⁴ CIPSEA, Section 502(9).

⁵ CIPSEA, Section 502(5).

for enforcement purposes. For example, the Commission has stated that such data will not be used to assess compliance with its “substantive” EEO rule, that it will dismiss any petition to deny filed by a third party based on Form 395-B data, and that such data may not be used as a “means for processing or screening renewal applications or mid-term reviews...[nor] as a basis for conducting audits or inquiries.”⁶ In short, the Commission has repeatedly sought to assure the broadcast industry that the 395-B data would only be used for “statistical purposes.”⁷

Stripped to its essence, MMTC’s argument is that the Commission should make the Form 395-B data public and attributable for the very “non-statistical” purpose that the D.C. Circuit has condemned twice in finding the Commission’s former EEO rules unconstitutional.

Finally, despite MMTC’s assertions to the contrary, Section 334 of the Communications Act does not prohibit the FCC from maintaining the Form 395-B statistical data confidentially. While Section 334 may preclude the Commission from making major revisions to the Form 395-B, this prohibition is inapplicable here as *no changes* to the Form 395-B would be required at all. As the State Associations pointed out in their Comments, broadcasters would simply file the unchanged reports electronically in CDBS as they have done in the past. The only difference would be that Commission would not provide a public link to the actual Forms 395-B after they are filed. This would allow the FCC to know the filer’s identity as Commission staff would have

⁶ *In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding*, 15 FCC Rcd 22548 at ¶ 35 (2000).

⁷ That said, as the State Associations pointed out in their Joint Comments, the Note to Section 73.2080, 47 C.F.R. § 73.2080 can be read to provide that while the FCC will not use the race, ethnicity, and gender data to assess compliance with the *equal employment opportunity requirements* under Subsection (b) of its EEO Rule, the FCC *will allow, and indeed will facilitate*, use of the data to assess an individual broadcast licensee’s compliance with the *nondiscrimination requirements* under Subsection (a) of its EEO rules. The State Associations have asked the Commission to clarify its intent and to make it clear that 395-B data may not be used to assess a broadcaster’s compliance with Subsection (a) of its EEO rule.

access to the completed Form 395-B data as filed and would ensure that the forms are not used for the improper purpose of comparing an individual station's workforce to the general population.⁸ It would also allow the Commission to reject MMTC's invitation to make the Form 395-B statistical data public which would jeopardize the new EEO regulatory scheme in its entirety.

B. NONE OF THE REASONS GIVEN BY MMTC JUSTIFY THE FCC WITHHOLDING ITS PLEDGE OF CONFIDENTIALITY

On its face, CIPSEA supports the State Associations' position that the Commission may lawfully and otherwise properly offer a pledge of confidentiality in connection with any Form 395-B filing requirement. Specifically, if the Commission were to collect the Form 395-B data pursuant to CIPSEA, all of the following stated findings of Section 511 of the Act would be served:

(1) Individuals, businesses, and other organizations have varying degrees of legal protection when providing information to the agencies for strictly statistical purposes; (2) Pledges of confidentiality by agencies provide assurances to the public that information about individuals or organizations or provided by individuals or organizations for exclusively statistical purposes will be held in confidence and will not be used against such individuals or organizations in any agency action; (3) Protecting the confidentiality interests of individuals or organizations who provide information under a pledge of confidentiality for Federal statistical programs serves both the interests of the public and the needs of society; (4) Declining trust of the public in the protection of information provided under a pledge of confidentiality to the agencies adversely affects both the accuracy and completeness of statistical analyses; and (5) Ensuring that information provided under a pledge of confidentiality for statistical purposes receives protection is essential in continuing public cooperation in statistical programs.⁹

⁸ MMTC asserts (at 11) that maintaining the confidentiality of the Form 395-B data for broadcasters would be unfair to cable operators who are required to make their annual employment reports available for public inspection at a central location at the cable system. There is no improper disparate treatment given the power of life and death which the FCC holds over broadcasters, but not over cable systems. Furthermore, whether or not there is some theoretically perception of unfairness, such a concern is not a reasonable basis for the FCC to refuse to exercise the discretion given to it under CIPSEA (give a pledge of confidentiality to broadcasters) which is necessary to avoid jeopardizing the entire EEO regulatory scheme.

⁹ CIPSEA, Section 511(a)(1)-(5).

These findings, largely ignored by MMTC, conclusively demonstrate that the scope of CIPSEA is much more broad than MMTC would have the Commission believe. And contrary to MMTC's claims, collection of the data would increase the trust of broadcasters and would undoubtedly provide licensees with confidence that they have the maximum protection necessary to ensure that the Form 395-B statistical data would not be used impermissibly as it has been in the past. In short, collecting the Form 395-B statistical data under CIPSEA will serve all of the stated purposes of the Act.¹⁰

MMTC's other claims with respect to the CIPSEA are similarly misplaced. MMTC asserts that CIPSEA does not apply to the collection of 395-B data because (i) the FCC has not offered to accept the data under a pledge of confidentiality, and (ii) the FCC has not in the past limited its use of the data exclusively for statistical purposes. There are fundamental fallacies in these two lines of argument. First, MMTC assumes its conclusion, namely that the Commission should not offer a pledge of confidentiality in connection with its collection of this race, ethnicity, and gender grouped employee profile data. On this point, MMTC's Comments are tied to the past and do not take into account the holdings in *Lutheran Church* and *Broadcasters*, the enactment of CIPSEA, or the risks to the Commission's EEO regulations overall if the Commission were to reinstitute its past practice of making Form 395-B statistical data publicly available on a station-attributed basis. Whether the Commission should offer a pledge of confidentiality, and make any necessary or appropriate changes in its present rules, are issues to

¹⁰ Moreover, MMTC is simply wrong in concluding that collecting the Form 395-B data confidentially would somehow undermine the integrity of the data collection process. As noted above, broadcasters would simply file their Forms 395-B in CDBS as they have done in the past. Collection of the data in this way would permit the Commission to have access to a filer's identity and the completed Form 395-B. In addition, every broadcaster is fully aware that Federal law requires that any information provided to the FCC must be truthful and correct. Should the Commission have any concerns in this regard, it can simply audit a station to examine the documentation that supports the data contained in the Form 395-B as filed.

be decided by this proceeding. Unless Section 73.3612 of the Commission's rules, as it reads today, was intended to prejudge this issue, the issue remains open for full evaluation herein.

Second, MMTC cites to the FCC's past practice of using Form 395-B statistical data to review the individual EEO programs of renewal applicants and to allow third parties to use the data to negotiate over employment issues and in petitions to deny and other objections or complaints against renewal and other licensing activities. However, the same MMTC Comments acknowledge that these uses are no longer permissible. Thus, these past uses do not represent a current or future legitimate "non-statistical purpose" that the Commission could rely upon to justify not applying CIPSEA to FCC Form 395-B data.

MMTC also posits several possible new uses for station-attributed FCC Form 395-B data. However, those possible uses, neither separately nor in the aggregate, justify either the conclusion that CIPSEA does not apply, or the risk that by requiring the public filing of such data the Commission will have placed in constitutional jeopardy its new EEO regulatory scheme.

As one example, MMTC suggests that the Advisory Committee for Diversity for Communication in the Digital Age ("Diversity Committee") could use station-attributed data to target licensees with strong records of hiring and retaining minorities and women to find out how they have achieved their success. What MMTC would have the Commission overlook is that the Diversity Committee (i) will still have available to it the same final, aggregated data on full-time and part-time employee profile data grouped by race, ethnicity and gender in the various job categories, that are available to Congress and the public at large, and (ii) is free at any time to contact licensees with strong reputations in this area and sit down with those licensees to explore the reasons (goals, programs, techniques, practices, etc.) for their successes and has done so. Moreover, it should be noted that MMTC's position here is contradicted by the position that it is

taking in this same proceeding. MMTC has stated specifically that this subject matter lies outside the Diversity Committee's purview, taking the position that "other proposals are pending in the EEO rulemaking, which we understand to be not within the scope of the Committee's work."¹¹ In any case, what the Diversity Committee might decide to do in the future is no justification for creating a governmental requirement that will place impermissible pressure on all licensees nationwide to recruit and hire based on race, ethnicity, and gender and thereby place the FCC's entire EEO regulations in constitutional jeopardy. Surely the Diversity Committee does not want to be the reason why that risk was voluntarily assumed or to the share responsibility for the potential adverse consequences.

MMTC suggests another purpose for making the Form 395-B data publicly available on a station attributed basis, namely that such disclosure will deter employment discrimination and assist licensees in self-assessing their efforts to prevent discrimination. There are at least three fallacies to this argument. First, the nondiscrimination prong of the Commission's EEO rule, along with numerous other Federal, state, and local employment nondiscrimination laws, already act as strong deterrents to unlawful discrimination by licensees. Second, as mentioned before, MMTC essentially admits that such government mandated disclosure will act as an "effective regulatory tool" to spur "improved performance" which in this context can only mean increased hiring of minorities and women because they are minorities and women. However, that effect is precisely why D.C. Circuit vacated the earlier EEO rules in both *Lutheran Church and State Broadcasters*. Accordingly, MMTC's line of argument rests on an impermissible use of the data. Third, as relates to "self assessment," every licensee knows which of its employees are women

¹¹ *Memorandum from David E. Honig, Executive Director MMTC to Fellow Members, Federal Advisory Committee on Diversity in the Digital Age* Attachment at 4 (Sept. 29, 2003) available at <http://www.fcc.gov/DiversityFAC/docs/honig9-29-03.pdf>.

and minorities. Such licensees do not need to file Form 395-B to learn that information. Furthermore, MMTC's suggestion that licensees need to know this information in order to practice "self-assessment" is the equivalent of suggesting that such licensees need to know how many minorities and women a station employs so that it can increase its employment of minorities and women based on race, ethnicity and gender, contrary to the teachings of both the Court in *Lutheran Church and Broadcasters* as well as the Commission in promulgating its efforts-based EEO regulations.

As yet another purported purpose for making station attributed Form 395-B statistical data publicly available, MMTC argues that this information is necessary for the Commission to assess the effectiveness of its newly revised EEO Rule. However, the FCC has stated that it wants this data to evaluate industry trends, not station by station trends. The type of data available in the annual report to Congress shows whether the hiring of minorities and women, both overall and in certain job categories, is increasing, is stable, or is decreasing. Those trends, coupled with an analysis of general economic conditions, should be sufficient to guide the Commission in its decision to maintain, modify one way or another, phase out, or eliminate its present EEO regulations. The suggestion that the Commission needs to look at Form 395-B data on a regional basis is illogical since the FCC has not promulgated EEO regulations that are different for the various regions of the country.

Contrary to another suggestion of MMTC, for much the same reason, there is clearly no justification for assessing the racial, ethnic, and female hiring based on station format or programming types. The FCC has not promulgated EEO regulations that are different for various formats, etc. Indeed the suggestion is abhorrent under First Amendment principles. As soon as a licensee knows that it may be targeted for EEO-related scrutiny because of the type of

format it is using, or is considering using, the Commission will have discouraged that licensee from staying with or experimenting with that format. Viewed on an industry-wide basis, this form of targeting will discourage the broadcast industry from using or experimenting with that format across the board.

MMTC's suggestion that the data is needed to assess the "progress" of hiring minorities and women in "different companies" is no different than assessing such progress on a station by station basis. In each case, it would constitute impermissible government pressure on licensees to recruit and hire based on race, ethnicity, and gender.

None of MMTC's additional suggestions that the parties to MMTC's Comments, historians and academics, want to "research" employment practices in the broadcast industry, and that prospective employees may want to check the employment practices of stations where they may work justify placing the FCC's entire EEO regulatory scheme in constitutional jeopardy. Suffice it to say that the Commission has twice amended its EEO regulations to eliminate constitutional deficiencies found by the Court. The Court has on at least two occasions evidenced concerns about the public availability of Form 395-B statistical data on a station attributed basis. None of MMTC's purported rationales support the notion that the Commission should again place its EEO regulations at risk. While MMTC uses the word "research" to give its position a laudable and erudite patina, the real motive is use the FCC Form 395-B data as an impermissible "discovery" tool, enabled and facilitated by the FCC, so that they can pressure licensees to hire based on race, ethnicity, and gender under threat of regulatory or judicial litigation. As shown above and elsewhere in this proceeding, these same organizations have said as much in prior pleadings, but have sought to camouflage that intent here. Finally, the person who wants to work at a station, but is concerned how the station may treat minorities or women,

is really no different from the person who wants to know how the station treats its employees in general. The curiosity of such a person should not be allowed to place the FCC in the position of having to defend its entire EEO regulations against the claim that the mandatory public filing of Form 395-B data on a station-attributed basis unconstitutionally pressures stations to hire based on race, ethnicity and gender.

Conclusion

MMTC cannot have it both ways. If it wants to use the Form 395-B statistical data for enforcement "accountability" purposes under any aspect of the Commission's regulations, it has to concede that a public disclosure requirement mandated by the FCC will place heavy government pressure on stations to hire based on race, ethnicity, and gender, and thereby place in jeopardy the FCC's EEO regulations. If, on the other hand, MMTC is not really concerned about enforcement, none of its other reasons justify placing those EEO regulations in constitutional jeopardy. The choice is now the Commission's. The State Associations will be left with no alternative other than to again seek redress in court if the Commission decides to move to a results-based EEO regulatory scheme through the use of Form 395-B to pressure stations to recruit and hire based on race, ethnicity or gender.

Respectfully submitted,

By: /s/
Richard R. Zaragoza
Barry H. Gottfried
Paul A. Cicelski

Counsel for the Named
State Broadcasters Associations

SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037
(202) 663-8000
Dated: August 9, 2004

CERTIFICATE OF SERVICE

I, Julia Colish, a secretary with the law firm of Shaw Pittman LLP, hereby certify that copies of the foregoing "JOINT REPLY COMMENTS OF THE NAMED STATE BROADCASTERS ASSOCIATIONS" was served via U.S. mail on this 9th day of August 2004 to the following:

Angela J. Campbell
Karen Henein
Institute for Public Representation
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001

David Honig
Executive Director
Minority Media & Telecommunications Council
3636 16th Street, N.W.
Suite BG-53
Washington, DC 20010

Jack N. Goodman
Larry Walke
National Association of Broadcasters
1771 N Street, N.W.
Washington, DC 20036

/s/
Julia Colish

EXHIBIT 3



BIA Financial Network, Inc.
15120 Enterprise Court, Suite 100
Chantilly, Virginia 20151
Phone: 703.818.2425 ■ Fax:
703.803.3299

August 4, 2003

VIA HAND-DELIVERY

Mr. Les Smith
Federal Communications Commission
445 12th Street, S.W.
Room 1-A804
Washington, DC 20554

**Re: Broadcast Station Annual Employment Report - FCC Form 395-B
Federal Register Notice 68 FR 33694**

Dear Mr. Smith:

BIA Financial Network ("BIAfn") is submitting this letter in connection with the above-referenced Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission published in the Federal Register on June 5, 2003.

We are aware of the position taken in this matter by the State Broadcasters Associations and the National Alliance of State Broadcasters Associations. If the Commission intends to monitor employment trends in the broadcast industry, BIAfn would be very interested in serving as the responsible entity which collects, collates and publishes such data with the understanding that while the identify of all respondents will be made public to the FCC, the data collected will not be made publicly available on station-by-station attributed basis.

We believe that BIAfn is uniquely qualified to collect the 395-B Report data for broadcasters and the Commission. BIAfn has developed a twenty-year relationship with the broadcasting industry to provide quality and accurate information. In addition, the Commission has recently designated BIAfn as a reliable source of data for purposes of determining what radio stations are in what particular Arbitron Metros. Allowing BIAfn to serve the role suggested herein will greatly benefit the FCC, the broadcast industry, and the public.

Please feel free to call us if you have any questions. We would certainly be willing to discuss this matter with you or any other interested party.

Sincerely,

A handwritten signature in dark ink, appearing to read "Mark R. Fratrik".

Mark R. Fratrik, Ph.D.
Vice President
BIA Financial Network

We Create Value Through Excellence



EXHIBIT 4



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May 22, 2008

VIA ELECTRONIC-DELIVERY

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room
Washington, DC 20554

Re: In the Matter of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204, FCC Public Notice entitled "Media Bureau Seeks Comment on Possible Changes to FCC Forms 395-A and 395-B," released April 11, 2008 (DA 08-752)

Dear Ms. Dortch:

BIA Financial Network ("BIAfn") is submitting this letter in connection with the above-referenced Notice.

We are aware of the position taken by many state broadcaster associations concerning the potential collection of employment data of radio and television stations. If the Commission intends to monitor employment trends at these broadcast stations, BIAfn would be very interested in serving as the responsible entity which collects, collates and published the results of that data collection. As we mentioned in an August 4, 2003 letter concerning this same subject, while the identity of all respondents will be made public to the FCC, the data collected will not be made publicly available on a station-by-station basis.

We strongly believe that BIAfn is extremely qualified to collect these data and issue the corresponding reports. BIAfn has for over twenty years published widely-used reports on the radio and television industries, and has developed a reputation for accurate and reliable reporting. BIAfn is used by the Commission as a reliable source for determining what radio stations are in what particular Arbitron Metros. Finally, Dataworld, a division of BIAfn has for several years been assisting the Commission in its annual regulatory fee notification program.

Please feel free to call us if you have any questions. We are interested in discussing this matter with you or any other interested party.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark R. Fratrik". The signature is written in a cursive, flowing style.

Mark R. Fratrik, Ph. D.

Vice President

BIA Financial Network